No. 12,515

IN THE

United States Court of Appeals
For the Ninth Circuit

RALPH BARRY, as Trustee in Bankruptcy of Central Auto Supply Company (a corporation, bankrupt),
Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY (a corporation) and THE VALLEY NATIONAL BANK OF PHOENIX (a National Banking Association),
Appellees.

APPELLEES' REPLY BRIEF.

W. R. WALLACE, JR.,
W. R. RAY,
JOHN R. PASCOE,
WALLACE, GARRISON, NORTON & RAY,
2200 Shell Building, San Francisco 4, California,
FENNEMORE, CRAIG, ALLEN & BLEDSOE,
Phoenix National Bank Building, Phoenix, Arizona,
Attorneys for Appellee,
Lawrence Warehouse Company.

GUST, ROSENFELD, DIVELBESS, ROBINETT & LINTON,
Security Building, Phoenix, Arizona,
Attorneys for Appellee,
The Valley National Bank of Phoenix.

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Subject Index

Page

Statement of the case 1

Summary of argument 5

Argument 6

I.

There was no violation of Section 62-522 of the Arizona Code of 1939 6

II.

No conflict arises in this case between Section 62-522 of the Arizona Code of 1939 and the provisions of the Uniform Warehouse Receipts Act 8

III.

The Uniform Warehouse Receipts Act should be construed to achieve uniformity throughout the commercial world...... 9

Conclusion 11

Table of Authorities Cited

Cases

Pages

Commercial Natl. Bank v. Canal-Louisiana B. & T. Co., 239 U.S. 520, 60 L. Ed. 417 (1916) 11

Heffron v. Bank of America N.T. & S.A., 113 F. (2d) 239 (9th C.C.A., 1940) 8, 10

Union Trust Co. v. Wilson, 198 U.S. 530, 49 L. Ed. 1154 (1905) 8, 10

S.R.V.W.U.A. v. Peoria Ginning Co., 27 Ariz. 145, 231 Pac. 415 10

Sampsell v. Lawrence Warehouse Co., 167 F. (2d) 885 (9 Cir. 1948) 10

Statutes

Arizona Code of 1939:

Sections 52-801 to 52-849 .... 6, 8

Section 62-522 ....1, 6, 7, 9, 10, 11

Civil Code, Section 3440 3

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Appellees.

APPELLEES' REPLY BRIEF.

STATEMENT OF THE CASE.

In that portion of his Opening Brief entitled "Statement Relative to Jurisdiction" Appellant states that the principal question to be determined upon appeal as it appears to Appellant is whether the judgment of the District Court nullifies Section 62-522 of the Arizona Code of 1939 which is thereafter quoted. Thereafter Appellant makes much of the fact that this statute is not identical with similar statutes in other

states, although the identity of its general purpose and intent seems clear.

Thereafter, and under the title "Statement of the Case," Appellant states that his action challenges the validity of the business known as field warehousing.

After these somewhat general statements, we come to that portion of the brief designated as "Specification of Errors," and there Appellant attacks each of the findings of the District Court as having no evidence to support the finding. Curiously enough, Appellant makes no attempt to support his Specification of Errors.

The section of the Arizona Code upon which Appellant relies, reads as follows:

> "Chattel Mortgage of Merchant's Stock Void.—A mortgage, deed of trust or any other form of lien attempted to be given by the owner of a stock of goods, wares or merchandise daily exposed to sale, in parcels, in the regular course of the business of such merchandise, *and contemplating a continuance of possession of said goods and control of said business, by sale of said goods by said owner,* shall be deemed fraudulent and void." (Emphasis added.)

It is immediately apparent upon reading the statute that it is not different except in form from the usual Bulk Sales Statute. For example, the California statute makes void transfers of personal property, unless the transfer is accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred (California Civil

Code, section 3440). The District Court, in its finding of fact No. II, found as follows:

> "Said goods, wares and merchandise were deposited in the field warehouse of Lawrence Warehouse Company theretofore leased by it from Central Auto Supply Company, and remained in the possession and control of the said Lawrence Warehouse Company thereafter." (Tr. p. 19.)

In other words, the District Court found that the parties did not contemplate a continuance of possession of said goods and control of said business by said owner, but, on the contrary, that the goods and merchandise were deposited in the warehouse of the Lawrence Warehouse Company and remained in the possession and control of the Lawrence Warehouse Company thereafter. The simple question, therefore, to be determined upon this appeal is whether there was evidence to support the finding of the District Court, for, if under the Arizona statute there was an actual transfer of possession and control, the statute is without application to the transaction. This question can be very simply answered. At page 13 of Appellant's Brief, Appellant quotes from the testimony of the witness Robert E. Kersting, wherein the witness said, with reference to the arrangements between the bankrupt and the Warehouse Company: "* * * if we allow them to keep complete control of the inventory as to what came in and what went out, the Valley Bank would then lend us a certain sum of money" (Tr. p. 92).

The premises upon which the goods were stored had been leased to the Warehouse Company, and the Warehouse Company had entered into an agreement with the Central Auto Supply Company which provided the terms under which the Warehouse Company agreed to store the deposited goods (Pl's. Exh. No. 1; Tr. pp. 40-89); the Warehouse Company had placed a large number of signs around the leased premises indicating the fact of the lease and the fact that all of the commodities within the leased premises were within the custody of the Warehouse Company; the leased premises were separated from the premises used by the depositor by substantial partitions (Tr. pp. 93, 104, 154, 161, 180, 187; Defendant's Exh. A; Tr. pp. 103, 150); the leased premises and the goods therein were always under the actual immediate physical possession and control of the bonded employees of the Warehouse Company and no access thereto by others was permitted at any time except in the presence of and with the consent of a Lawrence bonded employee (Tr. pp. 162, 166, 170, 182, 184, 212, 227). No single instance is cited in the record of any person entering or departing from the leased premises except in the presence of and with the consent of a Lawrence bonded employee, and no single instance is cited in which any goods were either deposited in the warehouse or delivered from the warehouse except by a Lawrence bonded employee.

The quoted Arizona statute makes a transfer or lien void (as do almost all Bulk Sales statutes) when the goods so transferred remain on the premises and under the control of the transferor. All of the evi-

dence in this case makes it clear that the goods once deposited in the warehouse left the possession of the Central Auto Supply Company immediately and remained thereafter at all times in the possession of the Warehouse Company. To use the language of the California statute: "The transfer was accompanied by an immediate change of possession and was followed by a continued change of possession."

In the face of the evidence, it is idle for Appellant to remark that the District Court nullified the Arizona statute. The District Court upon the evidence found that the Arizona statute had been complied with exactly.

If we may restate the principal question to be determined, it appears to us to be: "Was there evidence to support the District Court's finding that the goods, wares and merchandise were deposited in the warehouse of the Lawrence Warehouse Company and thereafter remained in the possession and under the control of the Lawrence Warehouse Company?"

SUMMARY OF ARGUMENT.

A singue issue, and a single issue only, is presented upon this appeal; that is, whether there was evidence to support the finding of the District Court that the goods in question were deposited in the warehouse of and thereafter remained in the possession and control of Appellee Lawrence Warehouse Company. Appellant in his brief seeks at considerable length to inject an additional issue into the appeal; that is,

whether the Uniform Warehouse Receipts Act (secs. 52-801 to 52-849, incl. of the Arizona Code of 1939) repeals section 62-522 of the Arizona Code of 1939. This question is not before this Court and requires no determination upon this appeal. Under the facts of this case as shown by the evidence and in the findings of the District Court below, there was full compliance with the provisions of both statutes and no question arises as to any conflict between them. The issue is wholly false and requires no extended discussion by Appellees.

ARGUMENT.

I.

THERE WAS NO VIOLATION OF SECTION 62-522 OF THE ARIZONA CODE OF 1939.

Appellant has based his entire action upon an alleged violation of section 62-522 of the Arizona Code of 1939. He so charged in his complaint (Par. III thereof; Tr. pp. 3-4) and in his Objections to Findings of Fact, etc. (Par. IX 3 and X 2 thereof; Tr. pp. 24, 26). Appellee Lawrence Warehouse Company denied any such violation in its answer (Par. III thereof; Tr. p. 7) and Appellee Valley National Bank of Phoenix entered a similar denial in its answer (Par. III thereof; Tr. pp. 11-12). Upon the issue so raised the District Court found against Appellant and that finding is amply supported by the evidence.

Appellant in his Specification of Errors (Nos. 4 and 5; Opening Brief, pp. 20-21) charges that there

is no evidence to support this finding, but nowhere in his brief does he even attempt to show such a lack of evidence. It seems clear to us that this appeal must fail, since Appellant has not even attempted to demonstrate to this Court wherein there was any violation of the statute upon which he relies. Appellant apparently assumes that there was such a violation (although the District Court found upon ample evidence that there was no such violation), and upon that erroneous assumption Appellant seeks to create false issues upon which to blunt his lance.

Section 62-522 of the Arizona Code of 1939 provides as follows:

> "A mortgage, deed of trust or any other form of lien attempted to be given by the owner of a stock of goods, wares or merchandise daily exposed to sale, in parcels, in the regular course of the business of such merchandise, *and contemplating a continuance of possession of said goods and control of said business,* by sale of said goods by said owner, shall be deemed fraudulent and void." (Emphasis added.)

The evidence in the District Court below was uncontradicted that there was, in fact, a complete transfer of possession to Appellee Lawrence Warehouse Company, and there was no "continuance of possession of said goods and control of said business" by the bankrupt after that transfer. No summation of that evidence is necessary here; Appellant has pointed to no single word of evidence to the contrary, and it is clear from the record that the finding of the District Court is fully supported by the evidence.

There having been in fact a complete transfer of possession to Appellee Lawrence Warehouse Company, there was no violation of the Arizona statute. and only an excess of caution dictates any further answer to Appellant's Opening Brief.

II.

NO CONFLICT ARISES IN THIS CASE BETWEEN SECTION 62-522 OF THE ARIZONA CODE OF 1939 AND THE PROVISIONS OF THE UNIFORM WAREHOUSE RECEIPTS ACT.

No violation having been shown of section 62-522 of the Arizona Code of 1939, it is self-evident that there is no question here of any conflict between that section and the provisions of the Uniform Warehouse Receipts Act (Secs. 52-801 to 52-849, incl. of the Arizona Code of 1939). It has never been suggested, even by Appellant, that there was any violation here of the Uniform Warehouse Receipts Act itself. On the contrary, it is perfectly clear that the parties here intended to, and did in fact, comply fully with the provisions of that Act.

The question is no longer open for determination that field warehousing under circumstances as shown here is perfectly valid and creates a lien good against the trustee of a bankrupt depositor.

> *Union Trust Co. v. Wilson,* 198 U.S. 530, 49 L. Ed. 1154 (1905);
>
> *Heffron v. Bank of America N.T. & S.A.,* 113 Fed. (2d) 239 (9th C.C.A. 1940).

No charge is made here of any violation of the Uniform Warehouse Receipts Act under which the parties to the transaction were acting, and no discussion is necessary to show that the Act was fully complied with in all respects.

It is to be noted that a failure to transfer possession to the warehouseman and to retain possession thereafter would constitute a violation of the Uniform Warehouse Receipts Act just as it would constitute a violation of section 62-522 of the Arizona Code of 1939. The evidence being uncontradicted that there was such a change of possession which continued thereafter, it is clear that there was no violation of either statute, and, consequently, no question can possibly arise as to any conflict between them here.

III.

THE UNIFORM WAREHOUSE RECEIPTS ACT SHOULD BE CONSTRUED TO ACHIEVE UNIFORMITY THROUGHOUT THE COMMERCIAL WORLD.

Appellant dedicates the major portion of his Opening Brief to a wholly unjustified attack upon the principles of field warehousing and to an extended discussion of whether the Uniform Warehouse Receipts Act, as adopted by Arizona, repeals Section 62-522 of the Arizona Code of 1939. As we have stated above, the law is now too well settled to permit any valid attack upon field warehousing conducted in compliance with the Uniform Warehouse Receipts Act. Furthermore, since no violation of Section 62-522 of the Ari-

zona Code of 1939 appears in this case, there can be no conflict here between that section and the provisions of the Uniform Warehouse Receipts Act, and hence the question of repeal of the one by the other is not an issue in this case. There was no charge in the complaint, no reference in the answers, no testimony or other evidence, and no finding with reference to repeal of Section 62-522. Appellant has apparently injected this false issue into the case in an effort to becloud the true issue, i.e., whether there is evidence to support the finding of the District Court that there was a transfer of possession.

While the question is entirely academic upon this appeal, we do not desire to appear to acquiesce in Appellant's view of the law. The Supreme Court of Arizona has recognized the impact of the Uniform Warehouse Receipts Act upon preexisting local law, as follows:

> "Local laws must be interpreted in the light of the desire to make the Uniform Warehouse Receipts Act universal in its application throughout the commercial world." *S.R.V.W.U.A. v. Peoria Ginning Co.,* 27 Ariz. 145, 231 Pac. 415.

This principle has been stated and restated by this Court and by the Supreme Court of the United States.

Heffron v. Bank of America N.T. & S.A., 113 Fed. (2d) 239 (9th C.C.A., 1940);

Sampsell v. Lawrence Warehouse Co., 167 Fed. (2d) 885 (9 Cir. 1948);

Union Trust Co. v. Wilson, 198 U.S. 530, 49 L. Ed. 1154 (1905);

Commercial Natl. Bank v. Canal-Louisiana B. & T. Co., 239 U.S. 520, 60 L. Ed. 417 (1916).

These authorities would be controlling on the question if it were an issue in the case, which it is not. In an effort to create the issue, Appellant has assumed two things, first, that the transactions were proper under the Uniform Warehouse Receipts Act, and second, that they were improper under Section 62-522 of the Arizona Code of 1939. The first assumption is correct; no violation of the Uniform Act was ever charged or shown. The second assumption is wholly incorrect; the District Court found upon ample evidence that there was no violation of the section in question, and Appellant has demonstrated no error in that finding. Without that assumption there is no issue of repeal before this Court.

CONCLUSION.

Appellees respectfully submit that there was no error in the judgment of the District Court and that the judgment must be affirmed. Appellant's strictures upon the judgment as permitting a stock of merchandise "to be taken by a secret lien-holder in contravention of the Arizona statute" (Opening Brief, p. 34) and as permitting Appellees "to 'get around' the Arizona law through the use of a very clever scheme which they term 'field warehousing' " (Opening Brief, p. 46) simply have no support in law or in the evidence. The District Court properly found upon adequate evidence that there was no violation of Ari-

zona law as charged by Appellant, and that Appellant was not entitled to recover in this action. The judgment must be affirmed.

Dated, San Francisco, California,
June 21, 1950.

Respectfully submitted,
W. R. Wallace, Jr.,
W. R. Ray,
John R. Pascoe,
Wallace, Garrison, Norton & Ray,
Fennemore, Craig, Allen & Bledsoe,
Attorneys for Appellee,
Lawrence Warehouse Company.

Gust, Rosenfeld, Divelbess, Robinett & Linton,
Attorneys for Appellee,
The Valley National Bank of Phoenix.